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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

HARVARD M. ROBBINS, Plaintiff and Appellant, v. IRWIN SHELUB et al., Defendants and Respondents.	A133023 (San Mateo County Super. Ct. No. CIV-488929)

Plaintiff Harvard M. Robbins appeals from the judgment entered after jury trial in this medical malpractice action. He claims the trial court erred in denying two of his motions in limine, thereby allowing the admission of two items of evidence he asserts were irrelevant and unduly prejudicial to the outcome of the trial. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Complaint

On January 26, 2010, plaintiff filed a first amended complaint (FAC) against defendants Irwin Shelub and Peninsula Pulmonary Medical Group. The FAC contains five causes of actions: (1) professional negligence/medical malpractice, (2) professional negligence/informed consent, (3) negligent misrepresentation, (4) elder abuse, and (5) negligent infliction of emotional distress.[1]

The FAC alleges that in 2008, plaintiff (who was then 66 years of age) consulted with Shelub, a physician specializing in diseases of the lung, after incurring a positive

[1] From the record, it appears the last three causes of action were no longer at issue at the time of trial.

skin test for tuberculosis. Shelub first ordered a chest x-ray and a sputum culture, both of which were negative for active tuberculosis. Shelub then prescribed a nine-month supply of the drug Isoniazid to treat latent tuberculosis, allegedly without instructing plaintiff to return to the office for follow-up. Shelub also allegedly failed to order liver function tests, and failed to recommend any periodic testing for liver function. Additionally, Shelub failed to warn plaintiff of the possible risks of Isoniazid treatment, including an excessive risk of liver-toxicity. About three months later, plaintiff was diagnosed with chemical hepatitis caused by Isoniazid administration. While in the hospital, his liver function crashed and he was informed that he would not survive without a transplant. He eventually recovered without surgery, but continued to suffer adverse effects as a result of weakened liver function.

II. The Motions in Limine

At the outset of trial, plaintiff filed several motions in limine. One of these motions sought to exclude evidence of a 2005 positive tuberculin skin test (the 2005 test) that he did not disclose to his treating physicians. The other sought to exclude evidence pertaining to a form that he subsequently filled out to retain his staff privileges at Mills-Peninsula Hospital,[2] in which he stated that he had never tested positive for tuberculosis. Plaintiff contended the evidence was irrelevant and prejudicial.

Defendants asserted the evidence of the earlier positive test was relevant as it related to the question of plaintiff's own comparative fault. Specifically, it went to whether Shelub would have treated plaintiff differently had he known plaintiff's conversion from negative to positive for tuberculosis had occurred three years before he sought treatment. If so, plaintiff would bear responsibility for not having accurately reported his medical history. Defendants noted Shelub stated in his deposition that while he would still have recommended treatment with Isoniazid, his recommendation would not have been as strong if he had known plaintiff's true history. This is so because the

[2] Plaintiff is a licensed pediatrician.

risk of developing active tuberculosis from latent tuberculosis decreases over time. Knowing that information, plaintiff might have elected on his own to forgo treatment.

Plaintiff asserted, and the trial court agreed, that the prior test was not relevant to the standard of care. However, because Shelub had asked plaintiff directly if he had ever had a prior positive skin test, and plaintiff answered that he had not, the court concluded "The doctor's going to have to explain the significance of it—but it comes in." The court also stated: "I can't get over thinking that a patient should give a doctor everything accurately, so the doctor can make the best, most informed decisions about everything related to the patient." The court also ruled that the 2005 test could not be used as evidence of custom and habit, that is, it could not be used to show plaintiff consistently mischaracterized things.

In the second motion in limine, regarding the hospital privileges form in which he omitted the 2005 test result, plaintiff asserted defendants' sole purpose in introducing the form was to show that he was a bad person. The trial court deferred ruling on the motion, stating: "I'm going to have to hear how [plaintiff's] testimony comes up. I'm not—on any number of things—before we go into that. You won't be bringing it up. And we'll have to see how it sounds when you examine him." Subsequently, the court stated it would allow admission of the fact that plaintiff had twice failed to disclose his positive status, with the limitation that defendants would be prohibited from using this as evidence of custom and habit.

III. The Trial and Verdict

1. Plaintiff's Testimony

Plaintiff testified he has worked as a pediatrician for over 30 years. In August 2008, he was training a medical student who asked to see how a tuberculin skin test is administered. Plaintiff had one of his medical assistants perform the test on himself. Two days later, he noticed his skin was elevated, which usually means the test is positive. He saw Dr. Arnold Goldschlager, his primary care physician, and had a chest x-ray. The x-ray was negative. Unsure of the best course to take, Goldschlager referred him to Shelub. Plaintiff had seen Shelub earlier that year for his asthma.

During the visit, plaintiff told Shelub about his recent positive skin test for tuberculosis. Shelub recommended that he get a sputum test for tuberculin bacteria, which would show whether the infection was active or latent.[3] They also discussed Isoniazid treatment. Shelub told him Isoniazid could be liver toxic and that he would need to get a liver test sometime in the future. Plaintiff told Shelub he had a routine liver test scheduled in about a month, which had previously been ordered by Goldschlager. Though he was a little surprised Shelub would recommend Isoniazid, plaintiff mentioned he had prescribed the drug a few times for his own patients and considered it to be safe. Plaintiff's understanding of the drug was based on a book published by the Academy of Pediatrics that discusses treatments for children. According to the book, untoward effects of Isoniazid therapy, including severe hepatitis, are rare in children who are otherwise healthy. Plaintiff assumed the drug would be even less toxic to him because most medications are more toxic to children than adults.

About two weeks later, plaintiff went back to see Shelub, who told him the tests showed he had latent, not active, tuberculosis. Shelub said he was going to treat it with Isoniazid. He prescribed a three-month supply plus two refills, to cover the nine-month course of treatment. Shelub never told plaintiff to schedule a follow-up appointment. He did not advise plaintiff that he would need periodic liver testing, or give him any warnings about consuming alcohol or taking other medications. Nor did he discuss any age-related risks of treatment. Plaintiff began taking the drug. Had he known the drug posed a high risk of liver toxicity, he would not have taken the Isoniazid.

Plaintiff's previously scheduled liver panel test was performed in October 2008. The results were normal, and plaintiff believed the test showed he would not have any problems with the Isoniazid going forward. Sometime in November 2008, he started to feel unwell. He had recently injured his shoulder and was taking some Tylenol and Ibuprofen for pain. He did not think to contact Goldschlager because he had just had a normal liver test and believed he was merely overly tired. He also did not think to call

[3] Latent tuberculosis is not contagious. (Centers for Disease Control and Prevention, *Questions and Answers about Tuberculosis,* p. 1 (2009).)

Shelub because the doctor had not told him to return for any more visits. Instead, plaintiff decided to take some time off and traveled to Mexico to rest.

Plaintiff did not have any sense that his liver was failing until after he returned from his vacation and one of his assistants told him that his eyes were yellow. Goldschlager ordered a liver panel test that day and the results were very abnormal. Shelub told him to stop taking the Isoniazid and to repeat the test a few days later. The test results were worse than before. Goldschlager told him to go to the hospital. He was admitted and placed in the intensive care unit. Later, he was transferred to a liver transplant ward to be evaluated for a transplant. He did not believe he was a good candidate, and thought he was going to die. Subsequently, he was discharged from the hospital and his liver function was monitored with testing. He suffered from severe edema and gained 30 to 40 pounds in water weight. Over the next several months, his condition gradually improved. Subsequently, a superior test for tuberculosis, called Quantiferon Gold, revealed that he actually never had latent tuberculosis.

On direct examination, plaintiff revealed he had self-administered a tuberculin skin test in 2005 that was also positive. He underwent a chest x-ray. Goldschlager received a copy of the x-ray but they never discussed it. He never told Goldschlager about the positive skin test. Plaintiff claimed he forgot about the 2005 test until his deposition in this case, when defendants' attorney pointed out the entry in his medical chart. He did not mention it when he visited Shelub in 2008 because he did not remember it at that time. He also did not report it on his 2007 application to renew his hospital privileges at Mills Peninsula Hospital. If he had recalled the test, he would have reported it. He disclosed the 2008 positive test on his most recent application and was granted privileges.

2. Shelub's Testimony

Shelub obtained his medical degree in 1973 from Baylor College of Medicine. After completing his residency, he obtained board certification in internal medicine. He also is a board certified pulmonologist, and has board certification in the area of critical

care. At the time of trial, he was the medical director of the intensive care unit at Seton Medical Center in Daly City. He also was the hospital's chief of staff.

Shelub first saw plaintiff in May 2008. Plaintiff was referred to him by Goldschlager to assess his asthma. He determined plaintiff was suffering from uncontrolled asthma with severe symptoms. At the time, plaintiff reported he was using his asthma inhaler medication about 10 times per day, a frequency that Shelub characterized as "remarkable." Shelub reviewed a chest x-ray that Goldschlager had ordered. The x-ray showed plaintiff had three very small nodules. Ultimately, Shelub determined a bronchopneumonia episode plaintiff had sustained months earlier may have been viral in part, triggering persistent asthma. The notes reflect that after a "careful discussion" with plaintiff, the two of them decided to proceed with a two-day treatment with steroids. The treatment's success was "relatively modest." At this time, plaintiff told Shelub that he had no history of tuberculosis or exposure to tuberculosis. Had he known of the 2005 positive test, Shelub would still have treated plaintiff's asthma with a short course of steroids, but he would have been cautious about any protracted course of steroids due to an increased risk of activating the latent tuberculosis.

Plaintiff came to see Shelub about the 2008 positive tuberculin skin test on August 27, 2008. Shelub told plaintiff that, due to his age, there would be a significant risk of hepatoxicity and chemical hepatitis if he were to be put on Isoniazid. However, a consideration for treatment included the potential for future use of steroids to control his asthma. Treating the latent tuberculosis with Isoniazid would avoid any risk of activating the tuberculosis during any subsequent protracted course of steroid treatment. Shelub also told plaintiff he would need to notify him if any symptoms of nausea, vomiting, abdominal pain, malaise, fatigue, or other ill feelings developed.[4] These symptoms are early signs of possible liver toxicity from the drug. He ordered a sputum test and chest x-ray to rule out active tuberculosis. Based on these tests, he diagnosed plaintiff as having

[4] Shelub acknowledged the medical chart for the appointment does not reflect that these warnings were given. However, he routinely informs his patients in the same way every time, so he doesn't write this information in the chart.

a latent tuberculosis infection. The chart note reflects he asked plaintiff to call him back within seven days. Plaintiff did not call.

Plaintiff next saw Shelub on September 24, 2008. Plaintiff did not have an appointment scheduled for that day. It is not uncommon for patients to try to see him without an appointment, particularly patients who are doctors and nurses. Shelub did not make a chart note of this visit, though it was at this time that he gave plaintiff the prescription for Isoniazid. He normally does not have a patient's chart pulled for drop-in visits. Patients also are not billed for these types of visits. Shelub conceded that he made a mistake in not making an entry in the medical record documenting that he had written the prescription, but he did not believe the "record-keeping" mistake affected the actual medical care that he provided plaintiff.

During this visit, Shelub told plaintiff he would need to have a liver function test in about a month. Plaintiff indicated that he already had a test scheduled for October 22, 2008, which Shelub said would be fine.[5] At trial, Shelub testified that he reminded plaintiff to contact him immediately if any adverse symptoms appeared. He also told plaintiff to report any changes in his current medications.

Shelub testified he told plaintiff to see him after the October 2008 liver function test. This is a routine instruction that he gives whenever he starts Isoniazid treatment on a patient with latent tuberculosis. He usually tells his patients to see him within a week after the tests are performed. With respect to plaintiff, Shelub testified: "I think it was pretty well understood that was to be in a few days or in a week to two." He acknowledged, however, that he never quantified the time frame for the return visit. He also acknowledged there is no chart note reflecting an instruction to follow up at any point after the liver function tests.[6] He did not tell any of his office staff to make a return

[5] Because Shelub was aware Goldschlager had ordered tests of plaintiff's liver function every six months for several years to monitor the effects of statin drugs that plaintiff was taking, he would not have ordered a baseline liver function test before starting the Isoniazid.

[6] Shelub testified that he did not receive a copy of the October 22, 2008 liver function test results until December 2008.

appointment for plaintiff. He expressed his belief that it is the patient's responsibility, not the doctor's, to make an appointment when the doctor requests him or her to do so.

Plaintiff next saw Shelub on December 19, 2008. This appointment was the first time Shelub charted the earlier prescription for Isoniazid. Shelub diagnosed plaintiff with chemical hepatitis caused by the Isoniazid. Prior to this time, plaintiff had not reported any of his symptoms to Shelub. At the visit, Shelub learned plaintiff had been feeling fatigued since mid-November. If he had called earlier and complained of fatigue, Shelub would have ordered a liver function test, asked him to come to the office the next day, and told him to forego his next dose of Isoniazid. Even without symptoms, if plaintiff had returned for an office visit after the October 22, 2008 test, Shelub would have ordered another liver function test to be given in the next 30 to 45 days.

Shelub testified plaintiff never told him about the 2005 test. Had he known of the 2005 test, he most likely would still have recommended the same Isoniazid treatment that was used. However, the information about the earlier positive test "would have changed to a certain extent the deliberation as to whether to treat." In particular, Shelub would have told plaintiff that people who have had positive skin tests for many years are not at as high a risk of developing the active disease as people who always have had negative tests and then convert to a positive test.

3. Plaintiff's Expert

Dr. Payam Nahid testified as an expert witness on behalf of plaintiff. He opined that Shelub met the standard of care during the May 2008 visit regarding plaintiff's asthma. He also indicated that Shelub's conduct during the August 2008 visit met the standard of care in terms of his diagnosis, and stated that he was justified in relying on plaintiff's representations regarding his tuberculosis history. Nahid further stated that even if Shelub had known of the prior positive test, it would still have been appropriate to start plaintiff on Isoniazid therapy.

When asked by defendants' counsel as to whether Shelub would have complied with the standard of care had he merely told plaintiff to make a follow-up appointment after the October 2008 liver function test, Nahid responded: "It's not – *I can't comment*

on what the standard of care is in regard to that. It's not how I would do it. It's not how our clinic does it, and it's not how I believe the majority of physicians I've talked to would do it. But to be honest with you, it's such a fine question, it's such a fine point, that I can't really tell you emphatically that it's enough or it is not enough to simply state to a patient I want to see you every month at a conversation over the phone, or in passing in a stop-by – you know, in a stop-over in a clinic." Nahid also agreed that plaintiff should have contacted Shelub when he experienced adverse symptoms while taking Isoniazid.

4. Defendants' Expert

Dr. John Luce testified as an expert witness for defendants. In his view, plaintiff should have notified Shelub of the 2005 positive skin test. He explained at trial that, having known about the 2005 test, the recommendation to treat plaintiff's latent tuberculosis with Isoniazid would have been "weaker," because the risk of acquiring active tuberculosis lessens over time: "So the recommendation might very well have been made—I would have made the recommendation myself to [plaintiff]—to consider taking [Isoniazid] even if it was known that his conversion was three years earlier, but it would have been a less strong recommendation without question." He also testified the standard of care did not require Shelub to have forced plaintiff to make an appointment with his office staff before leaving with the prescription for Isoniazid.

IV. The Verdict and Posttrial Proceedings

On June 10, 2011, the jury delivered its verdict, finding Shelub was not negligent in the diagnosis or treatment of plaintiff. The jury also found plaintiff had given an informed consent for the Isoniazid therapy.

On June 24, 2011, the trial court filed the judgment in favor of defendants.

On June 30, 2011, plaintiff filed a motion for a new trial. The motion was made on the grounds that "improper, irrelevant, prejudicial, and/or character evidence was offered to the jury and said evidence caused actual prejudice to the outcome of the trial." The motion focused on the trial court's rulings denying the two motions in limine described above.

On July 20, 2011, defendants filed a motion to strike the declaration of juror Christina Sum, which plaintiff had offered in support of his motion for a new trial. Among other objections, defendants asserted Sum's declaration was inadmissible under Evidence Code section 1150.[7]

On August 11, 2011, the trial court issued its order granting defendants' motion to strike Sum's declaration. That same day, the court denied plaintiff's motion for a new trial. This appeal followed.

DISCUSSION

I. Standard of Review

As in his motion for a new trial, plaintiff's appeal focuses on the denial of the two motions in limine. At the outset, he argues we should review the trial court's rulings under a de novo standard of review, while defendants argue for an abuse of discretion standard. On this point we agree with defendants.

" 'A motion *in limine* is made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to or move to strike the evidence. The purpose of a motion *in limine* is "to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." ' [Citation.] Generally, a trial court's ruling on an in limine motion is reviewed for abuse of discretion. [Citation.] However, when the issue is one of law, we exercise de novo review." (*Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392 (*Condon-Johnson*).) Here, plaintiff claims review is de novo because "The only question is one of law: whether evidence of the 2005 TB skin test is or is not non admissible character evidence or 'irrelevant' and 'prejudicial' under the meaning of the California Evidence Code." We are not convinced.

[7] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Our review of relevant cases suggests de novo review in this context is reserved for situations in which the court's evidentiary rulings have a decisive impact, as a legal matter, on the resolution of an issue in the case. For example, in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 634–635, a ruling on an in limine motion to exclude *all evidence* on a claim was found to be subject to independent review inasmuch as the motion was the functional equivalent of a motion for judgment on the pleadings or, if decided in light of evidence produced during discovery, a motion for nonsuit.[8] In *Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1000, the appellate court applied de novo review where the trial court's ruling on a motion in limine "was based entirely on a question of law: Does a cause of action for latent construction defects accrue when the defects cause some appreciable structural damage (even if the damage is not apparent), or does it accrue when the owner discovers the damage?"[9]

Another context in which de novo review appears warranted is when the trial court's evidentiary ruling goes to the interpretation of provisions in statutes or contracts. Thus, the issue in *Condon-Johnson* turned on the meaning of the word "indicated," as used in Public Contract Code section 7104, subdivision (a)(2). (*Condon-Johnson, supra,* 149 Cal.App.4th 1384, 1392.)[10] As this issue was a question of statutory construction, it presented a question of law to be reviewed de novo. (*Ibid*.; see also *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476 ["to the extent the trial court's decision

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[8] Similar reasoning applies in the context of criminal law: "Although we usually review a trial court's decision to admit or exclude evidence for an abuse of discretion [citation], where, as here, the record does not reflect the trial court exercised its discretion in making its ruling regarding [Penal Code] section 632, but rather reveals it determined as a matter of law that the facts of the case did not constitute a violation of that section, we apply the standard of review associated with rulings on motions to suppress evidence, essentially conducting a de novo review applying section 632 to the agreed-upon facts of this case." (*People v. Nazary* (2010) 191 Cal.App.4th 727, 746–747.)

[9] A decision is subject to de novo review when it "entails the resolution of a pure question of law, inasmuch as it 'relate[s] to the selection of a rule.' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.)

[10] The moving party sought to exclude evidence of disclaimers on a breach of contract claim on the ground that the disclaimers violated Public Contract Code section 7104. (*Condon-Johnson, supra,* 149 Cal.App.4th 1384, 1392.)

depends on the proper construction of [statutory provisions], as here, the issue is a question of law, which we review de novo."].)

In the present case, the trial court's rulings on plaintiff's motions in limine did not turn on the interpretation of a statute (as in *Condon-Johnson*) or the actual determination of a legal issue (as in *Siegel*). Nor were plaintiff's motions in limine the functional equivalent of a motion for judgment on the pleadings or a nonsuit motion (as in *Aas*). Here, there is nothing unduly remarkable about the evidence plaintiff sought to exclude, nor the perceived effect he claims the denial of the motion had on the trial. There is thus no basis for departing from the well-settled general rule that trial court rulings regarding admissibility of evidence, including rulings on motions in limine, are reviewed under the abuse of discretion standard.

Under the abuse of discretion standard, an in limine ruling regarding whether to keep particular items of evidence from the jury is subject to reversal "only where the trial court exceeded the bounds of reason. [Citation] In other words, the appellate court will not disturb the trial court's decision unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation] Moreover, when two or more inferences can reasonably be deduced from the facts, the appellate court cannot substitute its decision for that of the trial court." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1481.)

II. The Trial Court Did Not Abuse Its Discretion

Evidence Code section 352 (section 352) provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In exercising its discretion under section 352, a trial court is called upon to determine the probative value of the challenged evidence. Probative value is determined by three major elements: relevance, materiality, and necessity. (*People v. Lang* (1989) 49 Cal.3d 991, 1049 (conc. & dis. opn. of Mosk, J.).)

A. Relevancy

Plaintiff first claims the evidence of the 2005 tuberculosis skin test was erroneously admitted because it was not relevant to any issue at trial, claiming this fact "does not have much to do with any element of any cause of action, nor with any defense to any claim."[11] Specifically, he notes the positive 2005 test had no bearing on the manner in which the Isoniazid was administered, or on Shelub's diagnosis of his condition.

Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The court lacks discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Preliminarily, we note plaintiff represents that *defendants* introduced the 2005 test into evidence. As defendants correctly observe, it actually was plaintiff and not defendants who first introduced the evidence of both the positive 2005 test and the erroneously prepared hospital privileges form. This was doubtless a tactical move on his part to avoid having these facts come out during cross-examination, thereby suggesting to the jury that he had something to hide. Unlike defendants, we do not view this tactical decision as a waiver of the issues raised by plaintiff on appeal.

We conclude the 2005 test result was relevant to plaintiff's claim that Shelub failed to provide him with enough information upon which to give an informed consent to treatment. This was one of plaintiff's claims in his complaint, and therefore was one of the main issues in the case. A physician has a duty to disclose medical information to his or her patients in discussing proposed medical procedures. (*Cobbs v. Grant* (1972) 8

[11] Interestingly, in the course of the hearing on the motion in limine to exclude this evidence, plaintiff's attorney admitted that "our original theory of the case was that Dr. Shelub fell down on his job by failing to find out whether [plaintiff] was a converter in 2005 – whether there was a 2005 PPD test, tuberculin skin test. But upon discussing this issue with our own expert [who] came to the conclusion, even if there was a 2005 tuberculin skin test, Dr. Shelub still should have treated."

Cal.3d 229, 243–245.) As our Supreme Court has explained, "The scope of a physician's duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient's decision should be given. [Citation.] [¶] Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291.) The unique situation of each patient directly controls the extent of a physician's duty to disclose. (*Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 990–991.) Thus, it has been held that a patient's consent to a procedure is an informed one where the patient specifically requested not to be told about the intricacies of the procedure at issue, and had looked into the procedure herself and stated she was aware of what was involved. (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1083–1084 (*Putensen*).)

In the present case, Shelub testified that he would have given plaintiff different information had he known plaintiff was not a recent converter. Specifically, Shelub would have told him that the risk of developing active tuberculosis was less. In Shelub's view, this information might have affected plaintiff's decision to undergo Isoniazid therapy. Therefore, the proffered evidence was relevant as it went towards the kind of information Shelub would have provided to plaintiff. It is true Shelub testified he most likely still would have recommended the treatment. We thus agree with plaintiff that the evidence was not determinative. However, it does not follow that the evidence thereby lacked *any* "tendency in reason to prove or disprove any disputed fact" within the meaning of Evidence Code section 210.[12]

The evidence of plaintiff's failure to disclose his positive status on the hospital privileges form was relevant for similar reasons, though admittedly it was somewhat redundant. Simply put, both omissions show that plaintiff, for whatever reason,

[12] Additionally, while the jury never reached it, we believe this evidence was relevant to the issue of plaintiff's comparative fault, insofar as his failure to disclose the 2005 test results contributed to the decision to treat him at all.

consistently failed to report his 2005 positive test results. Again, while it is true that Shelub's treatment of plaintiff would not necessarily have been altered had plaintiff reported the earlier positive test, this does not render the evidence irrelevant at the time it was offered. Further, the trial court could not have foreseen the exact import the evidence ultimately would have on the course of trial at the time it ruled on plaintiff's motions in limine. Thus, the court did not abuse its discretion in concluding the evidence was relevant.

B. Whether the Relevancy Was Outweighed by Prejudice

Having concluded the evidence was relevant to plaintiff's claim of failure to give informed consent, the question remains whether the trial court abused its discretion by failing to exclude the evidence as unduly prejudicial under section 352. Appellant argues the evidence was prejudicial because it suggested that plaintiff "was a bad person for failing to seek medical care earlier for his latent tuberculosis" and for potentially becoming "a danger to his pediatric patients." He relies on the following passage found in *People v. Escudero* (2010) 183 Cal.App.4th 302, 310: " '[E]vidence should be excluded . . . as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating [them] to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]"

" 'Prejudic[ial]' in [section 352] does not mean 'damaging' to a party's case, it means evoking an emotional response that has very little to do with the issue on which the evidence is offered. [Citation.] Evidence which has probative value must be excluded under section 352 only if it is 'undu[ly]' prejudicial despite its legitimate probative value. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 597.) As one appellate court has explained: "[T]he idea that evidence should be excluded because it is 'highly prejudicial' to a litigant's case is a classic error. Often the most highly probative evidence is also highly damning, and therefore 'prejudicial' in a superficial sense of the word. [Section 352] does not, however, allow for the exclusion of evidence *merely*

because it is 'prejudicial' in the sense of damaging to a litigant's position. The relevant phrase from the statute is 'substantial danger of *undue* prejudice.' . . . *Undue* prejudice springs from evidence which has ' " 'very little effect on the issues.' " ' [Citations.]" (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 575.)

We have already explained the relevancy of plaintiff's failure to disclose his 2005 skin test results to Shelub. While plaintiff's omission of the test in the hospital privileges form was less relevant (as there was no evidence Shelub ever saw the form) the perceived prejudicial effect is identical. Specifically, to the extent the jury would have inferred from plaintiff's failure to accurately fill out the form that he was acting irresponsibly, that inference is also readily obtainable from the fact that he continued to practice medicine for three years after the positive test result in spite of knowing there was a risk that he could potentially transmit tuberculosis to his young patients. In other words, his failure to report the positive test result on his hospital privileges form did not substantially increase the potential negative impact on the jury. Overall, we cannot say this impact outweighs the relevance of his failure to disclose the 2005 test result. Accordingly, we conclude plaintiff has failed to demonstrate the trial court abused its discretion in concluding the relevancy of the challenged items of evidence was not outweighed by the danger of undue prejudice.

C. The Challenged Evidence Was Not Improper Character Evidence

Finally, plaintiff asserts the evidence pertaining to his 2005 skin test should have been excluded as improper character evidence. "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a); see also Evid. Code, § 1104 ["[E]vidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion."].)

Plaintiff claims defendants' motivation in seeking admission of the evidence was "to make the instant case a referendum on which party had the best character." This

assertion is founded on plaintiff's assumption that the evidence served no purpose other than to impugn his character. We have already concluded the evidence was relevant to substantive matters at issue in the case. Additionally, the evidence was relevant to the plaintiff's credibility as a witness in terms of the quality of his recollection of pertinent events, and his attitude toward his tuberculosis diagnosis and treatment. Thus, we find plaintiff's argument to be unconvincing. In large part, he relies on statements made by defendants' counsel in its opposition to his motions in limine, statements that were not repeated at trial. For example, defendants' counsel stated that plaintiff's lack of follow-up in response to his positive skin test "was tremendously irresponsible, both to himself and his pediatric patients." No corresponding statement appears in the transcripts of the trial with which we have been provided.

Further, the primary evidence plaintiff cites to for support is the posttrial declaration of the juror that the trial court struck as inadmissible when it denied his motion for new trial. In the declaration, juror Christina Sum states that the evidence of plaintiff's failure to report his 2005 positive skin test caused her to believe he "had various character flaws including being irresponsible, or worse." She also reported that during jury deliberations "it became clear to me that other jurors on the panel felt the same way." Based on this evidence, "many jurors on the panel expressed the opinion that [plaintiff] had poor character either for not acting diligently and responsibly, or for simply being reckless with his own health and his pediatric patient's health." She further reports "many of us jurors, myself included, considered [plaintiff's] character flaws in determining the merits of the claims in this case." The trial court struck the declaration as inadmissible, a fact that plaintiff rather conspicuously fails to mention in his opening brief on appeal. On February 23, 2012, defendants renewed their motion to strike the declaration from the appellate record. On March 12, 2012, this court deferred the motion to strike to the decision of the appeal.

Sum's statements to the effect that she and her fellow jurors considered plaintiff's perceived character flaws in reaching their verdicts are of the type that are generally barred by Evidence Code section 1150. The "law distinguishes between proof of overt

acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror or jurors which can be neither corroborated nor disproved. [Citation.] [¶] The only improper influences that may be proved under [Evidence Code section] 1150 to impeach a verdict therefore are those open to sight, hearing and the other senses and thus open to corroboration." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 974; accord, *People v. Hutchinson* (1969) 71 Cal.2d 342, 346–350.)

For example, in *Putensen* declarations set forth the inferences the jurors drew from the trial court's statement that the jury was not entitled to certain information it requested during deliberations. (*Putensen, supra,* 12 Cal.App.3d 1062, 1082–1083.) The appellate court found that "[t]hese matters had the effect of proving the mental or reasoning processes of said jurors and, as such, were not subject to corroboration or disproof." (*Id.* at p. 1083; see also *Krouse v. Graham* (1977) 19 Cal.3d 59, 81 ["An assertion that a juror privately 'considered' a particular matter in arriving at his verdict, would seem to concern a juror's mental processes, and declarations regarding them, accordingly, would be inadmissible under section 1150"]; *Continental Dairy Equip. Co. v. Lawrence* (1971) 17 Cal.App.3d 378, 385, 387 [declarations that jurors were confused about the evidence and "that several of the jurors wanted to get it over with and to go home since they were tired due to the length of the trial" held to prove "the mental processes or reasons and subjective considerations which influenced their verdict and did not constitute competent evidence to impeach the verdict"].)

As noted above, Sum's declaration reported that the jurors were influenced by plaintiff's perceived character flaws in arriving at their verdicts. This clearly concerns their subjective mental processes. We thus agree with defendants that Sum's declaration is inadmissible under Evidence Code section 1150 and grant the motion to strike the declaration from the appellate record.

D. No Showing of Prejudicial Error

Even if the trial court did abuse its discretion in admitting the challenged evidence, we conclude the error was not prejudicial. A judgment may be reversed only if the trial court's error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code

Civ. Proc., § 475.) A " 'miscarriage of justice' " will be declared only when the reviewing court, after examining the entire case, concludes that " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) On appeal, it is the burden of the appellant, with complete and accurate citations to the law and the record, to explain, often in excruciating necessary detail, precisely how each challenged evidentiary ruling of the trial court operated to the appellant's legal prejudice. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 [the appellate court's duty to assess the prejudicial impact of an error only arises when the appellant has first fulfilled his or her duty to tender a proper prejudice argument; that is, the appellant bears the duty of spelling out in his or her brief exactly how the error caused a miscarriage of justice].)

Plaintiff rather unconvincingly asserts the case was "a close call, at best," inferring he would have received a better result (at least a hung jury) if the evidence had been excluded. He also claims that after the trial, the jurors were unanimous in concluding defendants' expert Luce lacked any credibility. We note there is nothing in the record to support this assertion. Plaintiff also relies on Sum's declaration, now stricken from the record, referring to it as "the sole and best source of evidence" that the jury's decision was motivated by its distaste for plaintiff. Finally, he relies on statements made by opposing counsel outside the presence of the jurors as evidence that defendants have conceded the prejudicial nature of the 2005 test result.

Plaintiff also claims prejudicial error is shown because the verdict was close in that the jury was split nine to three in favor of defendants on the issue of negligence, which was the minimum number of votes defendants needed to prevail. It does appear that it took some time for the jury to arrive at its verdict and that there were some difficulties during deliberations, as the jurors sent a note asking what they should do if they were hung. In our view, the evidence firmly supported the jury's verdict in spite of the two challenged evidentiary issues. As a factual matter, it was established at trial that Shelub told plaintiff Isoniazid was liver-toxic and that he would need a liver function

study after he started the medication. Further, plaintiff's expert witness Nahid could not say that Shelub, assuming he communicated a need for further visits, fell below the standard of care in failing to ensure plaintiff actually scheduled a follow-up visit after the October 2008 blood test. Nahid also agreed it would be reasonable for a physician to expect a patient to call if he or she experienced fatigue or malaise while taking Isoniazid.

Nor was the disputed evidence heavily emphasized by opposing counsel. During closing arguments, defendants' counsel asserted that the only issue was one of credibility, as both experts agreed as to the basic parameters of the standard of care. The issues were: (1) whether plaintiff was advised of the risks associated with age, (2) whether Shelub told him to follow up, and (3) whether he was told of the need for further liver function studies. Defendants asserted plaintiff did receive this information, and plaintiff asserted he did not. Written documentation was lacking. Thus, counsel framed the case as a credibility battle between Shelub and plaintiff.

In attacking plaintiff's credibility, defendants' counsel did reference the 2005 positive test. After noting plaintiff never told Shelub about the 2005 test result, counsel also addressed the omission on the hospital privileges form: "Wrong information. Perhaps, he forgot. But that's the wrong information on an important matter that his hospital wants to know about." This is the sole negative reference made with respect to the form in defendants' closing argument. Instead, counsel emphasized that causation was lacking because plaintiff was responsible for his own predicament in that he did not notify his physicians of his symptoms of fatigue even though he knew such symptoms could be caused by liver failure. Counsel noted much of the harm could have been avoided with early detection. In sum, we conclude it is not reasonably probable plaintiff would have achieved a different result had the disputed evidence been excluded.

DISPOSITION

The judgment is affirmed.

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Dondero, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.